Nos. 95-124 and 95-227

In the Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ALLIANCE FOR COMMUNITY MEDIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1486, authorizes operators of cable television systems to prohibit indecent programming on channels set aside for lease by unaffiliated third parties ("leased access channels") as well as channels reserved for public, educational or governmental ("PEG") use. In addition, with respect to the leased access channels, if the cable operator chooses not to prohibit indecent programming on those channels, the operator must place such programming on a separate channel and block access to that channel until the cable subscriber requests access in writing. The questions presented are:

1. Whether a cable operator's decision to prohibit indecent programming from its leased access or PEG channels is "state action" attributable to the federal government.

2. Whether Section 10 or its implementing regulations violate the First Amendment in requiring cable operators who choose not to ban indecent programming on their leased access channels to segregate and block such programming, permitting access only upon a subscriber's written request.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulation:

Miscellaneous:

Miscellaneous—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals *in banc* (Pet. App.[1] 2a-88a) is reported at 56 F.3d 105. The opinion of the panel (Pet. App. 90a-125a) is reported at 10 F.3d

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[1] References to "Pet. App." are to the Appendix to the Petition in No. 95-124.

812. The Federal Communications Commission's First Report and Order (Pet. App. 128a-177a) is reported at 8 FCC Rcd 998, and its Second Report and Order (Pet. App. 178a-202a) is reported at 8 FCC Rcd 2638.

JURISDICTION

The judgment of the court of appeals *in banc* was entered on June 6, 1995. Petitions for a writ of certiorari were filed on July 21, 1995, and August 9, 1995, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal law requires operators of cable television systems with more than 36 channels to set aside a certain number of channels for commercial lease by unaffiliated third parties, see 47 U.S.C. 532(b), and empowers local franchise authorities to have operators reserve certain channels for "public, educational, or governmental [PEG] use." 47 U.S.C. 531 (Supp. V 1993).

When Congress first enacted these provisions in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (the 1984 Act), it forbade cable operators from exercising editorial control over their PEG and leased access channels, see 47 U.S.C. 531(e), 532(c)(2) (1988), and provided that operators "shall not incur any * * * liability" under federal, state, and local obscenity laws for programs carried on such channels. 47 U.S.C. 558 (1988).

Congress revisited the question of indecent and obscene cable access programming as part of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460

(the 1992 Act). "The problem," Congress was informed, "is that cable companies are required to carry, on leased access channels, any and every program that comes along," including programs that include a wide variety of highly indecent material. 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms).[2] Members of Congress were aware that "early and sustained exposure" to such material can cause "significant physical, psychological, and social damage to a child." *Id.* at S649 (statement of Sen. Coats).

To protect against the harm to children and to return a measure of editorial control to cable operators, Congress decided to allow operators to prohibit indecent programming on leased access channels. Thus, Section 10(a) of the 1992 Act permits cable operators to enforce "a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 47 U.S.C. 532(h) (Supp. V 1993).

Congress also found that the problem of indecent programming existed on PEG as well as leased access

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[2] See 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (describing leased access program in New York that "depicts men and women stripping completely nude," another featuring people performing oral sex, and a channel with advertisements promoting "incest, bestiality, [and] even rape."). See also *id.* at S648 (statement of Sen. Thurmond) (noting leased access channel with "numerous sex shows and X-rated previews of hard-core homosexual films" as well as channels with advertisements for phone lines letting listeners eavesdrop on acts of incest).

channels.[3] Congress accordingly adopted Section 10(c) of the 1992 Act, which requires the Commission to enable cable operators to prohibit the use of PEG channels "for any programming which contains obscene material, sexually explicit conduct or material soliciting or promoting unlawful conduct." See note following 47 U.S.C. 531 (Supp. V 1993). In this way, Congress intended to permit cable operators "to police their own systems, which they cannot do now." 138 Cong. Rec. S650 (daily ed. Jan. 30, 1992) (statement of Sen. Wirth).

Congress also required the Federal Communications Commission to promulgate regulations to limit the access of children to the indecent programming that continued to be carried on leased access channels. Section 10(b) of the 1992 Act requires operators who permit the carriage of indecent programming on leased access channels to place the programming on a separate channel and to block a subscriber's access to that channel until the subscriber requests in writing that the channel be unblocked. See 47 U.S.C. 532(j) (Supp. V 1993). As Congress was informed, the segregation and blocking requirement was "precisely the same method" that Congress used to block access to indecent telephone messages (so-called "dial-a-porn"). 138 Cong. Rec.

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[3] See 138 Cong. Rec. S649 (daily ed. Jan. 30, 1992) (statement of Sen. Fowler) (observing that such channels were being used "to basically solicit prostitution though easily discernible shams such as escort services, fantasy parties, where live participants, through two-way conversation through the telephone, are soliciting illegal activities"); see also *id.* at S650 (statement of Sen. Wirth) (agreeing that public access "has * * * been abused").

S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms). Congress enacted no similar segregation and blocking requirement for PEG channels, however.

Section 10(d) of the 1992 Act eliminates the immunity of cable operators for obscene access programming, by making clear that operators would be free from liability for programming on leased access and PEG channels "unless the program involves obscene material." 47 U.S.C. 558 (Supp. V 1993). As the provision's sponsor explained, "it was never the intent of the Congress * * * to provide a safe harbor for obscenity." 38 Cong. Rec. S652 (daily ed. Jan. 30, 1992) (statement of Sen. Helms).

2. The Commission adopted final regulations implementing the provisions of the statute governing leased access channels in its *First Report and Order*, 8 FCC Rcd 998 (1993) (Pet. App. 128a). The Commission made clear that, consistent with the definition contained in Section 10(a) of the statute (itself based on the Commission's longstanding formulation), indecent programming subject to blocking consists of "programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." 47 C.F.R. 76.701(g); Pet. App. 148a-149a.

The Commission issued regulations concerning the carriage of programming on PEG channels in its *Second Report and Order*. Pet. App. 178a-202a. The agency again rejected the contention that by authorizing private cable operators to choose to prohibit certain programming on PEG channels, the statute and the implementing regulations violated the First Amendment. Pet. App. 181a-183a. The Commission

also construed the statute's coverage of programming containing "sexually explicit conduct" to mean that the programming must be "indecent." Pet. App. 186a-187a. The Commission found such a construction to be reasonable, "given the purpose underlying section 10 as a whole and its legislative history, namely, reducing the exposure of viewers, especially children, to 'indecent' programming on cable access channels." Pet. App. 187a.

3. Petitioners, a number of cable programmers and organizations of listeners and viewers, filed petitions for review of the Commission's orders in the court of appeals, contending that Section 10 and its implementing regulations violated their rights to free speech under the First Amendment.

a. After staying the regulations pending review, a panel of the court invalidated Sections 10(a) and 10(c). Pet. App. 111a. The panel held that, because those provisions permitted cable operators to ban indecent leased access and PEG programming, the operators' decisions to do so should be attributed to the federal government as "state action." Pet. App. 108a. The panel remanded the issue of the constitutionality of Section 10(b)'s segregation and blocking scheme for leased access channels to the Commission for further consideration in light of its invalidation of Sections 10(a) and 10(c). Pet. App. 122a-125a.

b. The appeals court subsequently vacated the panel opinion, heard the case *in banc*, and issued a judgment upholding Section 10 and the regulations. Pet. App. 2a-89a.

The full court held that the decision by cable operators to prohibit indecent leased access or PEG programming permitted by Section 10 is not "state

action" to which the First Amendment applies. Pet. App. 31a. The court emphasized that the statute does not "command" cable operators to prohibit indecent programming. Pet. App. 12a. Instead, the court explained, the statute "gives them a choice" (Pet. App. 18a); operators "may carry indecent programs on their access channels, or they may not." Pet. App. 12a. As the court explained, that is the same choice that cable operators have with respect to all other cable channels they carry. Pet. App. 14a.

The court also concluded that the statute does not provide such "significant encouragement" to the decision by any cable operator to ban indecent access programming that "state action must be found." Pet. App. 19a. As the court recognized, "'[m]ere approval of or acquiescence in the initiatives of a private party' * * * cannot 'justify holding the State responsible for those initiatives.'" Pet. App. 22a (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005 (1982)). The court also found that it would be inappropriate to assume that the costs associated with Section 10(b)'s segregation and blocking scheme would cause cable operators to ban indecency from their access channels. Pet. App. 23a-25a. As the court explained, "[n]othing in section 10 specifies that [such costs] * * * must be borne by cable operators," and the FCC "has determined to take up this and related issues in its cable rate regulation proceeding upon the final resolution of this litigation." Pet. App. 24a. The court stated that "[i]n deciding this facial challenge to the regulations we are unwilling to speculate about the outcome of those proceedings." Pet. App. 25a.

In addition, the court determined, any effect that Section 10(d)'s removal of immunity for the carriage of obscene programming would have on an operator's programming decision would not support attribution of the operator's decision to ban indecent programming to the government. Pet. App. 26a-27a. The court observed that because obscene cable programming is constitutionally unprotected, Congress has the power to ban such programming altogether. The court noted that "Section 10(d) thus imposes on cable operators the same liability for obscene access programming that operators long have had with respect to other programming on channels they control." Pet. App. 27a. If "a cable operator takes this into account in deciding which programs to carry—on any channel," that fact could not "convert its refusal to carry indecent programming into state action."

The court determined, moreover, that leased access and PEG channels are not "public forums" for First Amendment purposes, since they are neither owned by the government, Pet. App. 29a, nor "so dedicated to the public that the First Amendment confers a right on the users to be free from any control by the owner of the cable system." Pet. App. 31a. The court found that the 1992 Act's leased access and PEG obligations are akin to common carrier requirements, which have never been thought to transform a private entity's decisions into those of the government. *Ibid.*

The court held that Section 10(b)'s segregation and blocking scheme constitutes state action, but is the least restrictive means of accommodating "two competing interests: the interest in limiting children's exposure to indecency and the interest of adults in

having access to such material." Pet. App. 33a. The voluntary use of lockboxes would not be an effective alternative, the court determined, since it would present cable viewers with "two, equally unacceptable options." Pet. App. 35a. Because such channels are controlled by no single editor, viewers either would have to "continually activate and deactivate" the lockboxes, "inevitably risking a slip up or a lapse that would expose their children to indecency," or they would have to "install lockboxes permanently, thereby giving up leased access programming altogether." *Ibid.*

The court rejected petitioners' arguments that Section 10 unconstitutionally discriminates against leased access programming, because it does not impose a similar segregation and blocking scheme on PEG or commercial cable channels. The court explained that leased access channels are unlike commercial channels, not only because no single editor is responsible for what is shown on leased access channels, but because indecency on other channels is generally shown only upon request and for a premium payment. Pet. App. 40a-41a. The court acknowledged that PEG channels "are comparable" to leased access channels in this respect, but found that PEG channels "did not pose dangers on the order of magnitude of those identified on leased access channels." Pet. App. 40a.

Finally, the court concluded, the statute's indecency standard is not impermissibly vague, noting that the standard tracks the Commission's generic definition of indecency, which this Court had re-

viewed and upheld in *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978). Pet. App. 42a-43a.[4]

ARGUMENT

The decision below is the first by any court of appeals to address the constitutionality of Section 10 and its implementing regulations. The decision does not conflict with that of any other court of appeals and correctly disposes of the issues presented by this case.[5] Further review is therefore not warranted.

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[4] Only Judges Wald and Tatel dissented in full from the *in banc* decision. Pet. App. 44a-76a. Judge Edwards found that Sections 10(a) and 10(b), read in tandem, impose an unconstitutional burden on speech, but sided with the majority as to Section 10(c), concluding that the provision "merely returns some editorial control to cable operators," which is "not the least bit objectionable." Pet. App. 78a. Judge Rogers agreed with the dissenters only with regard to Section 10(b); she would have, after severing that provision, upheld the rest of the statute. Pet. App. 88a.

[5] Petitioners in Denver Area Educational Telecommunications Consortium, et al. (collectively, DAETC), complain that the decision below conflicts with the decision of the district court in *Altmann* v. *Television Signal Corp.*, 849 F. Supp. 1335 (N.D. Cal. 1994), which granted a partial preliminary injunction against enforcement of Sections 10(a) and 10(c) of the 1992 Act (but upheld Section 10(b) as constitutional). The conflict between a decision of a court of appeals and that of a district court does not warrant this Court's review. In any event, the *Altmann* court, which has so far examined Section 10's constitutionality only for purposes of preliminary relief, did not have the benefit of the *in banc* decision in this case and remains free to reexamine its conclusion before it renders final judgment.

We note also that the district court in *Goldstein* v. *Manhattan Cable Television, Inc.*, No. 90 CIV 4750 (S.D.N.Y. Sept. 20, 1995), granted a preliminary injunction to a leased access programmer to prohibit a cable operator from segregating the

1. A governmental entity "'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the [government].'" *San Francisco Arts & Athletics* v. *United States Olympic Comm.*, 483 U.S. 522, 546 (1987) (quoting *Blum*, 457 U.S. at 1004). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient." *Blum*, 457 U.S. at 1004. Accord *San Francisco Arts & Athletics*, 483 U.S. at 547. In this case, nothing in Section 10 compels cable operators to prohibit indecent programming on leased access or PEG channels, or so significantly encourages operators to do so "that the choice in law must be deemed that of the [government]."

By its terms, Section 10(a) of the 1992 Act "permit[s]" cable operators to enforce a written and published policy of prohibiting indecent programming

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programmer's indecent programming and making it available only to subscribers who request access to it. Although the district court indicated—without any elaboration—its general agreement with Judge Wald's dissenting opinion in this case (slip op. 7), the court also noted that it believed that the case before it was stronger in a number of respects than this case. See slip op. 7-10. In addition, a stipulation entered into by the cable operator provided an independent basis for the preliminary injunction in *Goldstein* that has nothing to do with this case. See slip op. 10-16. In any event, any conflict between the district court's preliminary injunction decision in *Goldstein* and the court of appeals' final judgment in this case would not warrant review by this Court. Indeed, the pendency of *Goldstein* and *Altmann* in the district courts in the Second and Ninth Circuits suggests that further review in this Court of the issues common to all three cases can await the development, if any, of a conflict among the circuits on those issues.

on leased access channels. 47 U.S.C. 532(h) (Supp. V 1993). Section 10(c) of the 1992 Act similarly provides that the Commission should "enable" cable operators to prohibit the use of PEG channels for indecent programming. See note following 47 U.S.C. 531 (Supp. V 1993). In short, as the court of appeals recognized, "sections 10(a) and 10(c) do not command. Cable operators may carry indecent programs on their access channels, or they may not." Pet. App. 12a. Accord Pet. App. 18a ("Rather than coerce cable operators, section 10 gives them a choice."). Those provisions simply restore to cable operators the right—which they enjoy with respect to all other cable channels that they carry—to employ their equipment and franchises to carry or not carry indecent programming, in their discretion.

Petitioners contend that state action "is inherent in the creation of the * * * laws and regulations that are the subject of this litigation." Alliance Pet. 15. See DAETC Pet. 19. We do not dispute that Sections 10(a) and 10(c) are federal statutes, enacted and implemented as the result of governmental action. But the mere enactment of those provisions does not limit the speech of any individual or entity. Insofar as cable operators continue to carry indecent access programming, Sections 10(a) and 10(c) would have no effect on free speech rights. The only possible First Amendment effect of those provisions would occur if and when cable operators decide not to carry indecent access programming. The question presented, therefore, is whether such decisions by cable operators would be properly attributable to the government. Since nothing in Section 10(a) or 10(c) interferes with the cable operators' discretion in deciding whether to

carry indecent access programming, those decisions —if they are made—could not be said to be the result of state action.

To be sure, without Sections 10(a) and 10(c), cable operators would not have had the authority to prohibit indecent access programming. But such authorization was necessary only because federal law had in 1984 generally removed cable operators' editorial control over access channels. The 1992 Act simply seeks to restore the ability of cable operators to control the carriage of indecent programming on their cable systems, a power that, prior to access requirements, could not have been thought to have given rise to state action. As the court of appeals observed, "[t]o suppose that whenever Congress restores to cable operators editorial discretion an earlier statute had removed, the operators' exercise of this discretion becomes state action subject to the First Amendment, not only would disable the legislature from correcting what it perceives as mistakes in legislation, but also would deter it from experimenting with new methods of regulating." Pet. App. 15a.

Petitioners also maintain that state action is present because Sections 10(a) and 10(c) preempt contrary state law, relying on *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956). DAETC Pet. 19-20; Alliance Pet. 17-19. Unlike *Hanson*, however, federal law does not provide the "source" of the cable operator's "power and authority" to control indecent programming over access channels. 351 U.S. at 232. Instead, an operator's power to control the programming carried over its cable system stems from its ownership of the system; Sections 10(a) and 10(c)

simply remove an obstacle to the operator's exercise of its ownership rights that was put into place, as a matter of federal law, by the 1982 Act.

Moreover, since *Hanson*, this Court has made clear that the actions of private parties cannot be attributed to the government unless there is a "sufficiently close nexus" between the private party's actions and those of the government such that the actions of the private party can fairly be attributable to the government. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). That federal law permits a party to take an action free from state interference does not make that action attributable to the government; on the contrary, it supports the inference that the action should not be attributed to the government at all.

Petitioners Alliance for Community Media, et al. (collectively Alliance) contend that the 1992 Act encourages cable operators to prohibit indecent programming on their leased access and PEG channels, focusing on Section 10(d)'s removal of operators' immunity for the carriage of access programming that "involves obscene materials." Alliance Pet. 20-21. See 47 U.S.C. 558 (Supp. V 1993). It is well settled, however, that the government may prohibit obscene speech, since such speech falls outside the protections of the First Amendment. See, *e.g.*, *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115, 124 (1989). The fact that cable operators are now subject to such prohibitions with respect to their access channels—as they previously were with respect to all other channels they operate—does not provide a special incentive to operators to ban indecent programming that is not obscene. In any event, "[s]ome self-censorship is an inevitable result of all

obscenity laws." *Carlin Communications* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1297 n.6 (9th Cir. 1987), cert. denied, 485 U.S. 1029 (1988). See *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 60 (1989). And private parties make private decisions against a backdrop of criminal laws and obscenity statutes every day. As the court of appeals recognized (Pet. App. 27a), the fact that they take such laws into account does not transform their decisions into those of the state. *Carlin*, 827 F.2d at 1297 n.6.

Finally, petitioners contend that the First Amendment applies to any decision by a cable operator to refuse to carry indecent access programming, because access channels are "public forums." Alliance Pet. 23-25; see DAETC Pet. 20-21 n.11. As the court of appeals correctly discerned, the public forum doctrine derives from efforts to address the "issue of when the First Amendment gives an individual or group the right to engage in expressive activity on *government* property." *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 815 (1985) (Blackmun, J., dissenting) (emphasis added). The access channels in this case are plainly not government property.

As the court of appeals explained, "[t]he [access] channels belong to private cable operators; are managed by them as part of their systems; and are among the products for which operators collect a fee from their subscribers." Pet. App. 29a. To be sure, there are constraints (removed only in part in 1992) on the control a cable operator may exercise over access channels on its system. Those constraints, however, at most impose common carrier obligations on

operators, as the Commission and the court of appeals found. Pet. App. 31a; Pet. App. 139a-140a. And just as a heavily regulated utility may take action without having its decision attributed to the state, *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 358-359 (1974), so too a common carrier of information does not act as the government when it distinguishes between speech on the basis of its content. See, *e.g.*, *Sable Communications* v. *FCC*, 492 U.S. at 133 (Scalia, J., concurring) ("We do not hold that the Constitution requires public utilities to carry [indecent speech]."); *Information Providers' Coalition* v. *FCC*, 928 F.2d 866, 877 (9th Cir. 1991) ("a telephone carrier may * * * ban 'adult entertainment' from its network"); *Carlin Communications*, 827 F.2d at 1297 (carrier generally under no constitutional restraints in its policy of banning all "adult" programming from its network).[6]

2. The court of appeals also correctly concluded that Section 10(b)'s segregation and blocking scheme is the least restrictive means of advancing the government's compelling interest in protecting children from indecent programming. Pet. App. 36a.

a. Petitioners assert that cable "lockboxes"—devices that parents can use to block out the receipt of cable programming on selected channels (including, but not limited to, access channels) for particular

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[6] Petitioner Alliance contends that the appeals court's failure to treat private property under the public forum doctrine conflicts with *City of Jamestown* v. *Beneda*, 477 N.W.2d 830 (N.D. 1991), which reversed trespass convictions in a North Dakota shopping mall on First Amendment grounds. In finding the Constitution applicable, however, the *Beneda* court expressly relied upon the fact that the mall in question was publicly owned. 477 N.W.2d at 835.

periods of time—are a less restrictive means of providing the same protection. DAETC Pet. 23-24; Alliance Pet. 26-27. As the court of appeals recognized, however, leased access programming "may come from a wide variety of independent sources, with no single editor controlling [its] selection and presentation." Pet. App. 34a-35a (quoting *First Report and Order*, 8 FCC Rcd 998, 1000 ¶ 15 (1993)). Thus, in order to avoid exposing their children to indecent programming, "subscribers would have two, equally unacceptable options." *Ibid.* They could "continually activate or deactivate their lockboxes, inevitably risking a slip up or a lapse that would expose their children to indecency." *Ibid.* Or they could lock out leased channels permanently, "thereby giving up leased access programming altogether." *Ibid.* Thus, a system of voluntary blocking based on lockboxes imposes special burdens on subscribers that are not imposed by Section 10(b)'s mandatory blocking and segregation scheme.

Moreover, because the effective use of lockboxes depends upon parental vigilance and initiative to shield minors from indecent programming, that method risks much greater access to indecent materials than the segregation and blocking scheme imposed by Section 10(b). As the courts that have upheld the constitutionality of the government's efforts to protect children from indecent telephone messages (so-called "dial-a-porn") have concluded, voluntary blocking "would not even come close" to eliminating the access of minors to indecent messages. *Dial Information Services* v. *Thornburgh*, 938 F.2d 1535, 1542 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992); see also *Information Providers'*

Coalition v. *FCC*, 928 F.2d 866, 873 (9th Cir. 1991) (upholding Commission's finding that "voluntary blocking would not be an effective means of limiting minors' access to dial-a-porn services"). Finally, Section 10(b) imposes a "minimal[]" burden on those adults who desire to watch indecent leased access programming. Pet. App. 35a. The statute's segregation and blocking scheme does not forbid any adult subscriber from receiving indecent programming; it merely conditions receipt upon a request. 47 U.S.C. 532(j)(1)(B) (Supp. V 1993).

b. Petitioners also complain that the legislative record is insufficient to support Congress's choice of a segregation and blocking scheme over use of lockboxes. DAETC Pet. 23; Alliance Pet. 25. But Section 10(b)'s segregation and blocking scheme was based on similar blocking requirements used to control children's access to dial-a-porn. See 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms). In the dial-a-porn arena, experience had proved voluntary blocking alternatives ineffective. See *Dial Information Services* v. *Thornburgh*, 938 F.2d 1535, 1542 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992); *Information Providers' Coalition* v. *FCC*, 928 F.2d 866, 873 (9th Cir. 1991). Congress could reasonably draw upon the knowledge gained in constructing that analogous legislation to conclude that a similar voluntary method of attempting to protect children from indecent leased access programming would not as effectively achieve its goals.

c. Petitioner DAETC asserts that Section 10(b) is unjustifiably "underinclusive" because it applies to indecent programming on leased access channels but not on commercial channels. DAETC Pet. 22. But

the problem of an unwilling subscriber being confronted with indecent programming is far more acute on leased access channels. Unlike commercial channels, leased access channels are not controlled by a single editor, but instead carry programming from a wide variety of sources; "[w]hat will appear on these channels, and when, is anyone's guess." Pet. App. 40a. Moreover, much of the indecent programming carried on non-access channels is provided through "per-program or per-channel services that subscribers must specifically request in advance," and that therefore provide the functional equivalent of Section 10(b)'s segregation and blocking requirement. Pet. App. 40a-41a (quoting *First Report and Order*, 8 FCC Rcd at 1001 ¶ 19 n.20). Indeed, as the court of appeals observed, had Congress imposed controls of this type beyond the area where the problem it was addressing—exposure of children to indecency—existed, its action would have presented distinct First Amendment problems. Pet. App. 41a. In short, "there is no constitutional rule forbidding Congress from addressing only the most severe aspects of this problem, and there are constitutional doctrines, such as narrow tailoring and least restrictive means, that may have constrained it from going further than necessary." Pet. App. 41a.

e. Finally, the definition of indecent programming employed by Section 10 and the Commission's implementing regulations is not unconstitutionally vague, as petitioner DAETC contends. DAETC Pet. 12-16.

The statute and the regulations define indecent programming to mean "programming * * * that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by

contemporary community standards for the cable medium." 47 C.F.R. 76.701(g); see 47 U.S.C. 532(h) (Supp. V 1993). That definition is virtually identical to the Commission's generic definition of indecency, differing only insofar as it is tailored to the "cable medium." In the area of broadcast regulation, this definition has repeatedly been upheld as being "sufficiently defined to provide guidance to the person of ordinary intelligence in the conduct of his affairs." *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1338-1340 (D.C. Cir. 1988); *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), cert. denied, 503 U.S. 913 (1992); see *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978). And tailoring the definition to other mediums (such as telephones) does not render the definition any more subject to vagueness concerns. *E.g.*, *Dial Information Servs.*, 938 F.2d at 1540-1541; *Information Providers' Coalition*, 928 F.2d at 875. See also *Sable Communications* v. *FCC*, 492 U.S. 115 (1989).

DAETC contends that its vagueness concerns are accentuated by Section 10(b)'s reference to a cable operator's "reasonable belief" that the programming at issue is indecent. DAETC Pet. 12-13. Far from expanding the category of what may be found subject to the statute, however, the requirement underscores that the operator may not exercise his editorial control unless his belief that the material at issue is indecent is objectively "reasonable."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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